

**SUBJECT:** Low-level radioactive waste disposal site

**COMMITTEE:** Environmental Affairs: favorable, without amendment

**VOTE:** 5 ayes — Saunders, Alexander, Harris, Hightower, Kuempel  
1 nay — Oakley  
3 absent — Holzheuser, Jackson, A. Smith

**WITNESSES:** For — None. (Registered in support but did not testify — Brad Shields)  
  
Against — Irma Dominguez, El Paso Interreligious Sponsoring Organization (EPISO); Mary Alcorn, Scott Wilkey Memorial Foundation; Gayle Garner, El Paso County, Hudspeth County, Hudspeth County Conservation and Reclamation District No. 1, Hudspeth County Underground Water Conservation District No. 1. (Registered but did not testify — Dan McNamera, Sierra Club; Brigid Shea, Texas Clean Water Action)  
  
On — Rick Jacobi, Lee Mathews, Texas Low Level Radioactive Waste Authority; Bill Bryant, UT-Austin

**BACKGROUND:** The federal Low-Level Radioactive Waste Policy Act of 1980 requires all states generating low-level radioactive waste (which includes materials contaminated with radiation in nuclear power plants, laboratories, industry and medical procedures and research) to dispose of their waste either by constructing a disposal facility of their own or by entering into a compact with other states. Texas low-level radioactive waste is shipped to sites in Washington, Nevada and South Carolina.  
  
The federal act sets milestones for developing the facility and surcharges, rebates and penalties to encourage states to meet the milestones. January 1, 1992, is the deadline for submitting a license application; January 1, 1993 is the deadline for states to have operational disposal sites. If a state does not have a site that is accepting waste by January 1, 1996, the state must, if generators request, take title to and responsibility for waste.

Chapter 402 of the Health and Safety Code establishes the Texas Low-Level Radioactive Waste Disposal Authority. Since 1981 the authority has spent about \$13 million in general revenue to carry out its statutory mandate to select, construct, finance and operate a Texas disposal site for low-level radioactive waste. The law requires that, among other factor, the authority consider the geology, access, meteorology, population density, hydrology, flora, fauna, current land use and proximity to sources of waste when choosing a site. In selecting a site, the authority must give preference to a site on state-owned land over equally suitable privately owned sites.

After choosing a site, the authority must apply to the Texas Department of Health for a license for the facility.

In 1989 the disposal authority tentatively designated a disposal site in Hudspeth County, near Fort Hancock, which lies near the Texas-Mexico border about 50 miles southeast of El Paso. In 1987 El Paso County, Hudspeth County and other parties filed suit against the authority, challenging the appropriateness of the site. In January 1991 State District Judge William Moody of El Paso declared the Fort Hancock site unsuitable and ordered work there stopped. In April the attorney general filed an appeal of the district court ruling.

**DIGEST:**

(The author, Rep. Shelley, plans to offer a floor substitute for HB 2665. The floor substitute is summarized in the DIGEST; a digest of the bill as reported from committee is included in the NOTES section. The arguments refer to the author's floor substitute.)

**Designated Hudspeth County site.** The floor substitute for HB 2665 would require the Texas Low-Level Radioactive Waste Authority to select a potential disposal site in another part of Hudspeth County. The site would have to be in a 350-square mile portion of the county crossed by Interstate 10, east of the town of Sierra Blanca, west of the town of Allamore, north of the Eagle Mountains and Devil's Ridge, and south of the Diablo Plateau. (The southern boundary would be the 31° North latitude; the northern boundary 31° 15' North latitude; the eastern boundary 105° West longitude; and the western boundary 105° 22' 30" West longitude.) The authority would be required to evaluate the area, select one

or more potential sites, study the sites and submit information on the sites to the Health Department.

The disposal authority would be required to conduct additional studies and submit a license application on a site that the Texas Department of Health reports is likely to receive a license.

**Fort Hancock site.** If the health department reports that the potential site (or sites) is unlikely to receive a license or denies an application from a potential site, the authority would be required to choose the Fort Hancock site, described as about 13 miles northeast of Fort Hancock (authority-designated Site NTP-S34 located in sections 2,3,8,9 and 10, T&P Survey, Block 74, Township 6, Hudspeth County). The authority would have to study the site as necessary and submit a license application for the site.

**Health Department requirements.** The health department would be required to review the information on each potential site and report to the authority within 120 days on the likelihood that any potential site could be licensed. Reviewing potential sites would have priority over all other radioactive-materials and waste- licensing and registering matters, and the department would have to use department funds to review the sites.

The health department would have 30 days to complete its administrative review of a license application. If within 45 days of receiving an application, the department informed the disposal authority of its verdict on the application's administrative review, the application would be presumed to be sufficient. The department would have to give review of the application priority over all other radioactive materials and waste licensing and registration matters and would have to propose to issue or deny a site license no later than 15 months after the date that the license was considered administratively sufficient.

**Disposal authority powers.** The disposal authority would be given the power of eminent domain under Property Code Chapter 21 to acquire land for a disposal site in the specified areas of Hudspeth County.

With prior written notice telling the purpose, extent and types of activities, the authority, its contractors and agents would be able to enter public or

private property in the designated Hudspeth County area to assess the property as a potential disposal site. The authority would be liable for any reasonable damages.

**Court venue.** The authority would be able to sue and be sued only in Travis County courts. Judgments, injunctions, declarations or writs issued against the authority by any Texas court other than the Supreme Court would be automatically suspended if the authority appealed the order. Only the Supreme Court would be able to change the automatic suspension pending appeal.

This bill would take effect September 1, 1991.

**SUPPORTERS  
SAY:**

**Designated Hudspeth County site.** The floor substitute for HB 2665 would help settle a decade-long search for a Texas disposal site by requiring that the site be located in a politically and geographically acceptable area - a 350-square-mile sector of Hudspeth County farther from El Paso than the Fort Hancock site. Federal mandates should be taken seriously; they make it imperative that Texas get on with licensing a site.

The bill as substituted is necessary to give the authority statutory protection from never-ending legal challenges that could prevent a site from ever opening. Continuous legal challenges and appeals that prevent the authority from meeting federal deadlines could cost the state in penalties and expenditures to store current waste. Litigation already has held up the project for over three years. With this bill, a site would be selected based on its merits, not on a litigant's courtroom persuasiveness.

Parties still would be able to pursue legal challenges to the site by following statutory guidelines that would allow for appeals of the Health Department's license decision.

The bill would not reduce or alter site requirements. The site would have to be safe and meet scientific and other criteria, and the health department still would have to evaluate the site and rule on the license application.

A disposal site in the designated Hudspeth County location would be in a sparsely populated, geologically and hydrologically sound area about 90

miles from El Paso. The area would benefit from jobs and other economic development associated with constructing and operating the plant.

Gov. Ann Richards has said she believes the Fort Hancock site may present unacceptable risks to the citizens of the El Paso area and urged the authority to look for another site in the region.

**Health Department requirements.** The need to meet federal deadlines and quickly get a site licensed requires that the health department be directed to expedite the evaluation of a site license.

**Authority powers.** The authority needs the power of eminent domain and the right to inspect property to ensure that it can find and acquire the necessary land for a site. A site in the designated Hudspeth County area will most likely have to be on private land. Property owners may attempt to unrealistically hike up the price of any land in order to dip into the allegedly deep pockets of the state. The state has eminent domain power in other similar circumstances, such as acquiring land for highways.

**Court venue.** Travis County courts, which have extensive expertise in administrative law, should be the court of venue for suits against the authority. It could be difficult for the state to receive fair treatment in a local court on such a volatile topic as radioactive waste disposal. Because of the rapidly approaching federal deadlines and the need to actually open a site, the authority needs to be able to continue work if it is appealing a court judgment; this is not a drastic change in policy as the authority already has similar rights under civil procedure statutes. To avoid having work stopped by nuisance suits, the authority needs the specific protection of having judgments automatically suspended during appeals.

**Fort Hancock site.** The authority needs to have statutory authority to choose the site at Fort Hancock if no site in the other Hudspeth County area is licensed. It would create unacceptable delays if the authority had no definite fall-back position.

If it is needed, the Fort Hancock site would be a safe, acceptable disposal location. The disposal authority used a careful, step-by-step process during which it commissioned hundreds of reports and studies by independent,

respected scientists who used state-of-the art research to determine that the site is acceptable. Objections to the site were based on political and emotional factors. Local residents are not scientists or engineers qualified to rule on the technical aspects of the Fort Hancock site. The health department — not a court — should evaluate the scientific data and the merit of a license application for the Fort Hancock site.

**OPPONENTS  
SAY:**

**The designated Hudspeth County site.** The floor substitute for HB 2665 would impose a political decision concerning an issue that should be decided on technical and scientific grounds. A legislative edict that the radioactive waste disposal site be located in any one area would shift the philosophy from choosing the best site to choosing a politically acceptable site. If a location in the designated area of Hudspeth County is the best site, it should be chosen on its own merit through the detailed, objective selection steps. The state should not waste time and money by throwing away a well-researched, qualifying site in favor of the unknown.

Designating a site by statute would effectively deny the rights of local residents and other parties to use the legal system to challenge authority decisions. No one should be denied due process to use the judicial system to challenge state actions. Local officials should be guaranteed some input into a specific site selection.

Forcing the authority to give up the Fort Hancock site and conduct research and studies on the designated area in Hudspeth County would take at least two more years and cost millions. The cost of the preliminary site evaluations alone could run anywhere from \$3 million to \$5 million. The authority would have to repeat all of the same detailed steps it went through in selecting the Fort Hancock site, with no guarantee of finding a suitable site that can be licensed.

Delays in meeting federal deadlines will result in the state being financially penalized as well as the possibility that the state could be cut off from its current out-of-state disposal sites. This in turn could be costly for producers of low-level radioactive waste who might be forced to develop on-site storage facilities while waiting for the state's site to open.

**Health Department requirements.** The health department should not be saddled with legislative deadlines to evaluate a site license. The authority should have to pay for the administrative review, not the Health Department.

**Authority powers.** Granting the authority the right to enter property and the power of eminent domain would give too much power to a state agency. State agencies should have to request the privilege of entering private property, and property owners should be able to use the free market and negotiate the sale of any land.

**Court venue.** Suits against the authority should be brought in the district courts of localities affected by the authorities' decisions. It could prove difficult and expensive for citizens and localities in far West Texas to get a fair deal on the state's home turf in Austin. It is often easier, less expensive and more convenient for local entities to bring suits in their own courts.

If neither a site in the designated Hudspeth County area nor the Fort Hancock site are licensable, other residents should not be bound by the legal stipulations about venue and appeals in this bill.

**Fort Hancock site.** Mandating that the Fort Hancock site be chosen if another Hudspeth County site is unacceptable would deny El Paso and Hudspeth counties their legal right to challenge the state. The state should have to go through the judicial appeals process to challenge the district court ruling and should not be able to go around the local counties affected by the authority's decision. This bill, designed to overcome a particular court judgment and deny the plaintiffs what they gained through the judicial process, may even be a violation of the Texas Constitution's doctrine of the separation of powers.

The district court ruled against the disposal authority for good reasons — the Fort Hancock site is unsuitable for the state's disposal site. The site does not meet the scientific criteria for a safe site, and the authority should not try and engineer around the flaws in the site. It makes no sense to store volatile waste in the only area of Texas that has potential for earthquakes. The risks involved in locating the disposal site near the area's

water supply outweigh any perceived advantages to the spot. A spill or leak could also have international implication due to the proximity of the Fort Hancock site to the Mexican border. The disposal site should not be placed in the middle of the beautiful and fragile rock art and other geological formations of the Fort Hancock site and should not be so close (about 50 miles from El Paso) to a major urban center.

The state should not continue to pour money into developing and licensing the unacceptable Fort Hancock site. In the end, this would cost more than whatever it takes to find another site. Because only a few states are close to meeting the federal deadlines, it is unlikely that Texas would be singled out for harsh penalties for missing the deadlines.

NOTES:

**HB 2665 as reported from committee.** HB 2665 as reported from committee would require that the disposal authority choose as the disposal site all or part of the authority-designated Site NTP-S34 (sections 2,3,8,9,and 10, T&P Survey, Block 74, Township 6) in Hudspeth County, near Fort Hancock. The authority would have to apply to the Texas Department of Health for a license at the site.

The health department would have 30 days to complete its administrative review of the application.

The authority would be able to sue and be sued only in Travis County courts. Judgments, injunctions, declarations or writs issued against the authority by any Texas court other than the Supreme Court would be automatically suspended if the authority appeals the order. Only the Supreme Court would be able to change the automatic suspension pending appeal.

This bill would take effect September 1, 1991.

On May 9, the House passed a related bill, HB 1757 by Alexander, which would allow the disposal authority to issue revenue bonds, exempting the authority from state purchasing guidelines and allowing the authority to contract with private contractors. SB 553 by Sims, which would permit the authority to enter into compacts with other states to accept out-of-state waste, passed the Senate by 30-1 (Zaffirini) on April 23 and was reported



favorably with a substitute by the House Environmental Affairs Committee on May 7. HB 2877 by Haggerty which is pending in the Environmental Affairs Committee, would require the authority to partially reimburse counties for legal expenses challenging a proposed disposal site.